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Mr. Corbin Davis
Clerk, Michigan Supreme Court
PO Box 30052
Lansing, MI 48909

Re: ADM File No. 2010-13
Proposed Amendment to MCR 6.001



Dear Mr. Davis and Justices of the Supreme Court:

I am writing in response to this Court's proposed amendment to MCR 6.001, which would clarify that the discovery rules of MCR 6.201 do not apply at preliminary examination.

I find the proposal unremarkable, and am surprised at the vehemence of those who oppose it. Any proper interpretation of the rules must lead to the conclusion that MCR 6.201 simply does not apply at preliminary examination. MCR 6.001(A) states that the rules in subchapters 6.000-6.500 "govern matters of procedure in criminal cases cognizable in the circuit courts and in courts of equivalent criminal jurisdiction." A preliminary examination is not cognizable in circuit court. MCR 6.001(B) states that specific rules – notably not including MCR 6.201 – "govern matters of procedure in criminal cases cognizable in the district court." Since a preliminary examination is cognizable only in district court, MCR 6.201 simply does not apply to preliminary examinations. The proposed rule only clarifies that which, by a proper reading of the rules, is already the rule.

I am aware of the argument that since MCR 6.001(A) says in its catch line "felony cases" that the discovery rules apply to all felony cases, including those at preliminary examination. But MCR 1.106 states in clear and unambiguous terms that "[t]he catch lines of a rule are not part of the rule and may not be used to construe the rule more broadly or more narrowly than the text indicates." Any District Court which concludes that MCR 6.201 applies to felony cases at the preliminary examination stage is misreading the rules.

Contrary to the comments you have received in opposition to this proposed rule, the rule would not eliminate anything. It would simply make clear that MCR 6.201 itself only applies in Circuit Court, and does not apply at preliminary examination. The suggestion that this somehow violates a defendant's constitutional rights, given that there is no constitutional right to a preliminary examination, is wrong.

Those opposed to this proposal note that it is exceedingly difficult for defense counsel at a preliminary examination to sensibly advise clients without some knowledge of the strength of the prosecution's case. That is certainly true. And from the prosecution standpoint, we benefit from early disclosure of pertinent materials, to encourage resolution of cases by appropriate pleas. Since the decision of the Court of Appeals in *Bay County Prosecutor v Bay County District Judge*, 109 Mich App 476 (1981), most county prosecutor's offices have developed policies governing discovery before preliminary examination. In Kent County, defense attorneys are given the police reports that have been prepared to that point. Defense counsel will have those initial police reports in advance of preliminary examination. If supplemental reports have been prepared, the detective in charge of the case will bring those reports to the preliminary examination and copies will be given to defense counsel. If a laboratory report has been prepared, it will be turned over as well. All of this is beneficial to both the defense and the prosecution. And none of it would be affected by this Court's clarification that the specific provisions of MCR 6.201 do not apply at preliminary examination.

If those opposed to this proposal believe there is some need for a formal rule governing discovery prior to preliminary examination, they could certainly suggest adoption of a rule consistent with present practice, one that provides for limited discovery such as police reports, necessary to allow all parties to prepare for preliminary examination. As I read this Court's proposal, however, it does no more than clarify that the full panoply of discovery available under MCR 6.201 applies only after a case has been bound over for trial, that the specifics requirement of that rule do not apply to preliminary examinations, and that a District Court has no authority at preliminary examination to order discovery under the ambit of MCR 6.201. For that reasons, I support this proposal.

Thank you for allowing me the opportunity to express my position.

Sincerely yours,



Timothy K. McMorro
Chief Appellate Attorney